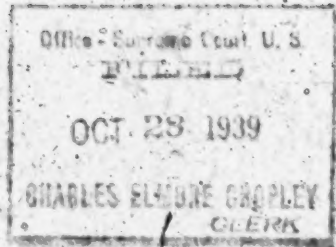


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No. 72

In the Supreme Court of the United States

OCTOBER TERM, 1939

UNITED STATES OF AMERICA, PETITIONER

v.

MRS. JULIA CAROLINE SPONENBARGER ET AL.

ON A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT
COURT OF APPEALS FOR THE EIGHTH CIRCUIT

SUPPLEMENTAL BRIEF FOR THE UNITED STATES

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I

MISSISSIPPI FLOOD CONTROL: 1928-1939.

We have shown, in our main brief (pp. 43-47) and in our brief in *Franklin v. United States*, No. 26⁷ (pp. 12-26), that even if respondent's land were subject to an increased flood hazard because of flood control work by the United States, there would be no liability. But we also go further than necessary, and insist that the land is in fact receiving increased flood protection.

This issue is predominantly factual. As such, it is controlled by the findings of the District Court.

Those findings, however, may appropriately be read against the larger canvas of the whole flood-control problem of the Mississippi River. Respondent relies liberally upon reports to Congress, statements made in Congressional hearings, and debate on the floor to establish the extent of the damage to her land. If we were to place each of these statements in their context, both documentary and chronological, most of the differences between petitioner and respondent would be eliminated. But since respondent's discussion runs to more than 400 pages, a detailed explanation of each statement would be likely to heighten the confusion. We shall, therefore, attempt no more than to supply a general framework of the history of Mississippi flood control since the Act of May 15, 1928. This outline, we believe, will be sufficient to give each of the statements relied upon by the respondent its proper content, by reference to the engineering plans and predictions at the time the statement was made.

1. *The Project Flood.*—The Mississippi River has a minimum flow of 103,000 cubic feet per second below the Arkansas River,¹ and an annual average flow of 560,000 second-feet.² These flows are

¹ H. Doc. No. 90, 70th Cong., 1st Sess. (hereafter cited as *Jadwin Report*), par. 45.

² General Ferguson, President of Mississippi River Commission, Hearings on S. 3354, Senate Committee on Commerce, 1938, 75th Cong., 3d Sess. (hereafter cited as 1938 Senate Hearings), p. 63.

enormously increased in times of flood. The greatest recorded flow from each of the main flood sources is: Upper Mississippi River, 370,000 second-feet; Missouri River, 550,000 second-feet; Ohio River, 2,000,000 second-feet; Arkansas, St. Francis, and White Rivers, 1,280,000 second-feet.³ If all of these flood sources gave their maximum flow simultaneously, a devastating flood of about 4,200,000 cubic feet per second would result. However, this synchronization of floods is most unlikely,⁴ and the Weather Bureau and the Army Corps of Engineers have concluded that the weather conditions which cause the floods are such that synchronization is impossible.⁵ The greatest recorded flood was that of 1927, when about 2,500,000 second-feet would have passed Arkansas City, if the river had been confined.⁶ Second only to the flood of 1927 is that of 1937, when 2,150,000 cubic feet per second went past Arkansas City.⁷ The flood control plans

³ General Schley, Chief of Engineers, Hearings on Flood Control plans, House Committee on Flood Control, 1938, 75th Cong., 3d Sess. (hereafter cited as 1938 House Hearings), p. 19; General Ferguson, 1938 Senate Hearings, p. 39; *Elliott*, Improvement of lower Mississippi River (1932), I, p. 93.

⁴ General Ferguson, 1938 Senate Hearings, p. 57.

⁵ General Schley, 1938 House Hearings, p. 19.

⁶ H. Report No. 1072, 70th Cong., 1st Sess., p. 326; General Ferguson, 1938 Senate Hearings, pp. 52-53.

⁷ Flood Control Plan for Ohio and Lower Mississippi Rivers, Report of Chief of Engineers, 1937, House Flood Control Committee Doc. No. 1, 75th Cong., 1st Sess. (hereafter cited as Markham 1937 Report), par. 20; General Ferguson, 1938 Senate Hearings, p. 40.

are based upon a theoretical flood of 3,000,000 or 3,200,000 cubic feet per second." This "super-flood" is not probable, but the Army engineers feel forced to think in terms "of an increase over any flood we have ever had by an amount that we do not know and which might be greater than we have even dared to estimate."⁹

The last decade has seen large-scale flood control planning and construction to meet this "project flood." The major types of projects which have been included in the plans at one time or another during this period include: (1) increase in height of the levees on the Mississippi and its tributaries; (2) the Birds Point floodway; (3) the Tensas basin floodway; (4) the Bonnet Carre floodway; (5) the Atchafalaya floodways; (6) channel cut-offs; and (7) tributary reservoirs. We shall deal, in summary fashion, with each of these projects.

2. *The Birds Point and Bonnet Carre Floodways.*—(a) The Birds Point floodway is designed, in time of flood, to become an additional channel for the Mississippi River below the confluence of the Ohio and Mississippi Rivers, and thus to protect Cairo, Illinois by increasing the discharge capacity of the river below the city.¹⁰ The project calls for lowering an eleven-mile stretch of the river

⁹ Jadwin Report, par. 100; General Ferguson, 1938 Senate Hearings, p. 52; General Schley, 1938 House Hearings, p. 19.

¹⁰ General Ferguson, 1938 Senate Hearings, p. 53.

¹¹ Jadwin Report, pars. 13, 125.

levee by about three feet and building a stronger and higher levee, set back about 5 miles.¹¹ The river levees have not yet been lowered, but the floodway is otherwise substantially completed; water was carried through it during the 1937 flood.¹² Since the water returns to the river at New Madrid, the floodway has no effect on the lower river. (b) The Bonnet Carre floodway is designed to protect New Orleans by discharging floodwater into Lake Pontchartrain. The Atchafalaya floodways will be operated so that the Mississippi will never be required to carry more than 1,500,000 second-feet past Baton Rouge; the Bonnet Carre floodway will relieve the river of 250,000 second-feet before it reaches New Orleans.¹³ It has been completed and was operated in 1937.¹⁴ It has only a limited effect upon the discharge capacity of the upper river.

3. *Increased Levee Protection.*—All flood control plans since the Jadwin Report have been based on the premise that the height of the levees on the Mississippi River could not be increased by any considerable amount.¹⁵ It was, however, recommended in that report that the Mississippi levees

¹¹ Jadwin Report, pars. 125, 126.

¹² Markham 1937 Report, par. 9; 1938 Annual Report of Chief of Engineers, pp. 2015, 2086-2087.

¹³ Jadwin Report, pars. 18, 114.

¹⁴ Markham 1937 Report, par. 9; 1938 Annual Report of Chief of Engineers, pp. 2089-2090.

¹⁵ Jadwin Report, pars. 6, 55, 76-80.

be strengthened and raised; they have been raised, in general, by 3 or $3\frac{1}{2}$ feet from the 1914 grade, except at the head of the projected floodways and along the Birds Point floodway; similarly heightened levees were recommended for the south banks of the Arkansas and Red Rivers.¹⁶ This work is now virtually completed.¹⁷ The Act of June 28, 1938, *infra*, p. 25, directs that the levee at the head of the Eudora floodway be constructed to the stronger 1928 section, although retained at the 1914 grade. This work is now in progress.

4. *The Atchafalaya Floodways.*—The Atchafalaya River forms a natural alternative outlet for the Mississippi, meeting the Old River at the point of junction with the Red River about 5 or 10 miles from the Mississippi. Under the Jadwin plan, the Atchafalaya was to be confined by levees with a parallel floodway on each side.¹⁸ The modification in the Act of June 15, 1936, substituted the Morganza floodway, with its head on the Mississippi about 15 miles downstream from the Old River, for the east Atchafalaya floodway but retained substantially the original plan for the Atchafalaya River and the west Atchafalaya floodway; a new outlet to the Gulf for the lower Atchafalaya backwaters was

¹⁶ Jadwin Report, pars. 123, 125, 127, 129; R. 357.

¹⁷ Report of Chief of Engineers on Flood Control Works, 1935, House Flood Control Committee Doc. No. 1, 74th Cong., 1st Sess. (hereafter cited as Markham 1935 Report), pars. 7-9; Markham 1937 Report, par. 7; 1938 Annual Report of Chief of Engineers, p. 2072.

¹⁸ Jadwin Report, pars. 19, 109.

also provided.¹⁹ It is contemplated, in rough approximation, that the Atchafalaya River will carry 500,000 cubic feet per second; when it is operating at capacity the controlled spillway will divert up to another 500,000 second-feet down the Morganza floodway; finally, if this is insufficient, the west Atchafalaya floodway will carry another 500,000 second-feet.²⁰ The levees on the river and forming the west Atchafalaya floodway are substantially complete. The Morganza floodway was tied to the Eudora floodway in Section 12 of the Act of June 15, 1936, and construction was delayed by the inability to condemn land until 75 percent of the necessary easements in both floodways had voluntarily been given; the 1938 Act, *infra*, p. 24, authorizes separate and immediate construction of the Morganza floodway and permits condemnation of all land.

The Atchafalaya and the Morganza floodways, together with the additional outlet to the Gulf, will serve to increase the capacity of the river at the latitude of the Red River and upstream from that point. This is because it will permit a more rapid discharge of the river, with a consequent lowering of flood stages, and an increase in the slope of the river. The increase in slope resulting from more rapid discharge, assuming the Atchafalaya floodways and outlets were to drop the river an

¹⁹ Markham 1935 Report, pars. 19, 21, 31, 43-47.

²⁰ General Ferguson, 1938 House Hearings, p. 38.

additional 6 feet, would produce about 1,000,000 horsepower (at a 2,000,000 second-foot discharge) serving to push the river downstream.²¹ None has yet estimated the effect of the Morganza floodway upon the capacity of the river as far upstream as Arkansas City, but it is agreed that it will have a tendency to lower the river stages in that region.²²

5. *Channel Cut-Offs*.—Engineers have long been attracted by the idea of increasing the capacity of the Mississippi by making cut-offs through its many looping bends. The proposals were earlier rejected as too dangerous (Br. for Respondent, pp. 403-405). The Jadwin Report unequivocally rejects this alternative as too uncertain, because of fear of the increased velocity of the water and the possibility that new bends will be formed.²³ Notwithstanding the absence of this feature from the adopted project,²⁴ the years subsequent to 1932 saw an increasing experimentation with this approach to flood control. The 370-mile stretch between the Arkansas and the Red Rivers has already been shortened by 115 miles.²⁵ An enlarged program has been recommended to and adopted by Con-

²¹ General Ferguson, 1938 Senate Hearings, p. 63.

²² General Schley, 1938 House Hearings, p. 850; General Ferguson, 1938 Senate Hearings, p. 63.

²³ Jadwin Report, pars. 69-71; see, also, *Elliott*, I, pp. 58 *et seq.*

²⁴ Any lack of authority has been ratified by Congress. See *infra*, p. 22.

²⁵ General Ferguson, 1938 House Hearings, p. 37.

gress.²⁶ The considerably increased capacity of the river in 1937 was probably due to the successful operation of the cut-offs,²⁷ and their effect will be even greater when the work has been completed so as to permit them to operate at full capacity.²⁸ They may so lower the flood stages of the river that the Eudora fuse-plug will retain more water than the safe capacity of the lower river,²⁹ but their full effect cannot even be estimated at this time.³⁰

6. *Reservoirs*.—It has been recognized from the outset that the ideal method of flood control would be the construction of reservoirs on the tributary rivers of the Mississippi and their tributaries (if locations sufficiently close to the alluvial valley were available). The Jadwin Report rejected this alternative as too expensive unless developed for the local benefits of local flood protection, water storage and power projects (pars. 81–95). The Act of May 15, 1928, in Section 10 appropriated \$5,000,000 for a further survey of tributary reservoirs. Subsequent reports of the Chief of Engineers recommended an extensive system of reser-

²⁶ Markham 1935 Report, pars. 19d, 21f, 34–35, 43 (9); Markham 1937 Report, par. 36; Sec. 1, Act of June 15, 1936; Sec. 1, Act of June 28, 1938; *infra*, p. 23.

²⁷ Markham 1937 Report, par. 36; General Ferguson, 1938 Senate Hearings, pp. 50, 73.

²⁸ General Ferguson, 1938 Senate Hearings, p. 50; General Schley, 1938 House Hearings, p. 850.

²⁹ Markham 1935 Report, par. 10.

³⁰ General Schley, 1938 House Hearings, p. 850.

voirs; many of these projects were adopted in the 1936 and 1938 Acts.³¹ In summary, some 144 tributary reservoirs have now been authorized.³² The reservoirs will, in general, contribute more to local benefits than to reduction of the Mississippi floods,³³ but the Chief of Engineers has estimated that when completed the comprehensive reservoir plan will serve to reduce flood stages by upwards

³¹ Markham 1935 Report, pars. 19e, 21g, 25, 38-41, 43 (9); Markham 1937 Report, pars. 13-25, 38 (a); Act of June 15, 1936, Sec. 1 (Br. 88); Act of June 28, 1938, Sec. 1 (*infra*, p. 23).

³² H. Rept. No. 2353, 75th Cong., 3d Sess. (hereafter cited as 1938 House Report), pp. 9-21, together with 1935 Markham Report, pars. 5, 39, 43 (10) shows that the reservoirs (with the dates of their authorization) are distributed as follows:

Ohio basin	-----	78
1934	-----	14
1935	-----	1
1936	-----	14
1938	-----	49
Upper Mississippi basin	-----	12
1936	-----	2
1938	-----	10
Missouri basin	-----	10
1935	-----	1
1938	-----	9
White basin	-----	15
1936	-----	9
1938	-----	6
Arkansas basin	-----	13
1936	-----	6
1937	-----	1
1938	-----	6
Yazoo basin	-----	7
1936	-----	7
Red basin	-----	1
1938	-----	1
Total	-----	136

³³ General Schley, 1938 House Hearings, p. 4; General Ferguson, 1938 House Hearings, p. 50.

of 540,000 cubic feet per second.³⁴ The reservoir projects were not sufficiently advanced to afford any protection during the 1937 flood.

7. *The Tensas Floodway.*—As developed at length in our main brief, the 1928 Act authorized construction of the Boeuf floodway through the Tensas basin and the 1936 Act authorized substitution of the Eudora floodway. The Jadwin Report contemplated a fuse-plug levee of 33 miles; the levees have in fact been left at the 1914 grade for about 60 miles.³⁵ The Eudora project calls for a controlled spillway at Eudora, about 45 miles below Arkansas City, with the floodway proper, contained between guide levees, running south from there; however, a back protection levee of 1928 grade is to run north to the Arkansas River levees, to guard against backwater and overtopping of the fuse-plug levees.³⁶ No work was ever done on the Boeuf

³⁴ The Ohio reservoirs will reduce Mississippi floods by 200,000 second-feet, the Missouri reservoirs by 140,000 second-feet, and the Arkansas and White reservoirs by 200,000 second-feet. Markham 1937 Report, pars. 18, 22, 23.

³⁵ The additional stretch of levees of the 1914 grade seems to have been in response to the requirement of Section 1 of the Act of May 15, 1928, that "pending completion of any floodway * * * the areas within the same shall be given the same degree of protection as is afforded by levees on the west side of the river contiguous to the levee at the head of said floodway * * *." See General Ferguson, 1938 House Hearings, p. 57.

³⁶ Markham 1935 Report, pars. 21 (a), 23 24, 43 (2), 43 (3), 43 (4); Sections 1 and 2, Act of June 15, 1936 (Br. 88-89).

floodway; none has yet begun on the Eudora floodway.

Under the existing law the Secretary of War and the Chief of Engineers are authorized to locate the guide-levees, to acquire flowage rights within the floodway, and to construct the spillway and floodway. Act of June 28, 1938, *infra*, pp. 24-25. It may be that, if there were no change in law, they would eventually be under a duty to do so. But Congress apparently does not contemplate immediate construction of the Eudora floodway. Section 12 of the Act of June 15, 1936, joined the Eudora and Morganza floodways, so that construction of neither could be begun alone (*supra*, p. 7). The Act of June 28, 1938, *infra*, p. 24, separated the two floodways, as had been contemplated by the Chief of Engineers in his 1935 report.³⁷ While couched in discretionary terms, it plainly contemplates immediate construction of the Morganza floodway and more leisurely construction of the Eudora floodway.³⁸ It provides:

The said Morganza floodway may be initiated and constructed *without delay*; and the

³⁷ Markham 1935 Report, pars. 19 (a), 19 (b), 21 (a), 21 (b), 23, 24, 31, 43 (2), 43 (3), 43 (4); Letter of Secretary of War, 1938 Senate Hearings, pp. 5-6.

³⁸ The successive changes in expression of the two Congressional Committees are significant, although the provision of the bill was the same in each case. The House Committee, while allowing the Chief of Engineers to construct the Morganza first, did not otherwise differentiate between the

United States may, within the discretion of the Chief of Engineers, irrespective of other provisions of law, proceed to the acquisition of flowage rights and flowage easements in the Eudora floodway, and to its construction as authorized by existing law. [Italics added.]

Thus, every flood control project in the alluvial valley of the Mississippi has either been completed or is in the course of construction except the Eudora floodway. The Army engineers still think either that the Eudora floodway is a necessary part of the scheme,³⁹ or that they cannot yet be sure that it will be unnecessary.⁴⁰ However, the taking of options on flowage rights in this area was suspended in May 1938 (1938 Annual Report of Chief of Engineers, pp. 2016, 2087).

two floodways. 1938 House Report, p. 24. The Senate Committee (Senate Report No. 1868, 75th Cong., 3d Sess.), while referring to the House Report for information as to the bill, expressly excepted those paragraphs and substituted the following:

"No objection has been made to the construction of the Morganza floodway. The Morganza floodway is merely supplementary to the East Atchafalaya floodway, and, viewing the Morganza and the East Atchafalaya as one project, it is now 80 percent complete. While the building of either the Morganza or the Eudora is left to the discretion of the Chief of Engineers, the bill contemplates that the Morganza floodway will be initiated and constructed without delay."

³⁹ Markham 1937 Report, pars. 32, 33; General Schley: 1938 Senate Hearings, p. 33; 1938 House Hearings, pp. 48, 872.

⁴⁰ General Ferguson, 1938 House Hearings, pp. 41, 55.

Whether there remains any necessity that the Eudora floodway be constructed, and whether the existing authorization will some day be repealed, depends upon the carrying capacity of the Mississippi River between the Arkansas and Red Rivers. Because respondent relies indiscriminately upon statements as to the capacity of the river in 1928 and at the present time, it will be necessary to make a collation of the estimated capacity at various dates.

8. *The Capacity of the River*.—All of the succeeding estimates are directed toward a fuse-plug levee of 1914 grade in the Arkansas City region. They show that the middle section of the Mississippi River has developed a steadily increasing flood capacity.

1927-1929.—The 1927 flood was not confined; but it is estimated that 2,500,000 cubic feet per second were discharged at the peak below the Arkansas River (*supra*, p. 3). In the 1929 flood, about 1,800,000 second-feet were carried safely down the river (R. 361).

1937.—By this time the levees had generally been raised about 3 feet along the river and cut-offs totaling about 100 miles had been made. The 1937 flood reached a peak of 2,100,000 second-feet, but was carried without overflow, and with a 5-foot lower stage than with the considerably smaller flow during the flood of 1929 (R. 361). The characteristics of floods vary greatly one from the other, so it

is probably unsafe to generalize from the 1937 flood alone." But it is evident that the capacity of the river had markedly increased.

1938.—The estimates of river capacity in 1938 are not uniform; General Schley, Chief of Engineers, tended to be pessimistic, while General Ferguson, President of the Mississippi River Commission tended to be optimistic. But, although General Schley several times refused to accept the latter's estimate and stated his belief that the capacity of the river was not much over 2,000,000 second-feet,⁴¹ the estimates are much closer than this would indicate. The formal estimate of General Schley, as opposed to his impromptu response, was that 2,480,000 second-feet could pass Arkansas City and 2,050,000 second-feet could pass Natchez⁴² with a 3-foot freeboard.⁴³ General Ferguson, on the other hand, testified that the river could carry 2,600,000 second-feet.⁴⁴ This estimate, however, did not allow for freeboard on the levees but sought to express the maximum flow which would not overtop the levees in the Arkansas City reach.⁴⁵ He had,

⁴¹ General Schley, 1938 House Hearings, p. 18.

⁴² 1938 Senate Hearings, p. 27; 1938 House Hearings, pp. 18, 849, 852-853.

⁴³ Channel work now in progress at Vidalia is expected to reduce the comparative congestion at Natchez (see *infra*, p. 16).

⁴⁴ 1938 House Hearings, p. 889.

⁴⁵ 1938 Senate Hearings, pp. 40, 50, 52, 55.

⁴⁶ 1938 Senate Hearings, p. 53; 1938 House Hearings, p. 54.

however, no doubt but that a flood of the volume of 1927 could be carried in 1938.⁴⁷ Since a 3-foot freeboard represents from 200,000 to 300,000 second-feet,⁴⁸ the two estimates are in fact reasonably close. With a 3-foot freeboard, then, the river in 1938 could carry over 2,400,000 second-feet at Arkansas City, and 2,050,000 second-feet at Natchez; over 2,600,000 second-feet could go by Arkansas City without overtopping the levee.

194- (?).—The river capacity at the completion of the project cannot accurately be estimated. The following factors, however, will substantially increase its capacity: (a) Setting back the town of Vidalia and increasing the channel depth opposite Natchez, work now in progress, will eliminate the congestion at that point as well as increase the upstream capacity, so that the need for the Eudora floodway to protect the lower river becomes less urgent. (b) Completion of the Morganza floodway and outlet will increase the upstream capacity of the river. (c) Completion of the tributary reservoir projects will reduce the volume of floods, by an extent estimated at 540,000 second-feet (*supra*, pp. 10-11). The combined future effect of these factors cannot well be less than a 500,000 second-feet gain; it may reach 1,000,000 second-feet.

In summary, the river can now carry its greatest recorded flood without overtopping the levees near

⁴⁷ 1938 Senate Hearings, pp. 40, 52, 55.

⁴⁸ General Ferguson, 1938 Senate Hearings, p. 40; R. 255.

Arkansas City. If the other projects are finished before the Eudora floodway is commenced, the river will carry the "project flood" safely, with a margin of at least 600,000 second-feet over the capacity necessary for the 1927 flood. The successful use of cut-offs and the tributary reservoirs, neither contemplated in the Jadwin plan, may develop into a sufficient substitute for the Eudora floodway. It may be that the floodway will be constructed in any event, to provide protection against all possible contingencies. But it is certain that the respondent's land—as a direct result of the Government's activities—is now receiving flood protection much greater than ever before; indeed, it is a matter of considerable doubt that it will ever again be flooded.

II

FLOWAGE RIGHTS IN THE FLOODWAYS

It may be useful to the Court if the statutory and administrative policy with respect to flowage rights in the various floodways were summarized.

1. *Birds Point*.—The 1928 Act called for a setback levee of 1928 grade and a reduction of the existing levee by about 3 feet.⁴⁹ This means that the land will have less protection than before, for the floodway will be used in every large flood on the upper Mississippi or the Ohio. Flowage rights must therefore be acquired under Section 4 of the 1928 Act; indeed, after the river levee is reduced,

⁴⁹ Jadwin Report, pars. 13, 125.

the Constitution would probably require compensation if they were taken without payment. Purchase of flowage rights for the 130,000 acres in that floodway, at an estimated final cost of \$2,078,000, is virtually complete.⁵⁰

2. *Bonnet Carre*.—This floodway, just above New Orleans, will be used almost as frequently as the Birds Point floodway; it was used in the 1937 flood. There the United States has acquired fee simple title⁵¹ at a cost of \$738,000.⁵²

3. *Morganza*.—This floodway will be used less frequently than Birds Point and Bonnet Carre, and more so than the West Atchafalaya or Eudora, since it comes into play whenever there is a flood in the lower river of more than 2,000,000 second-feet (*supra*, p. 7). It includes 60,531 acres.⁵³ The 1938 Act, *infra*, pp. 24–26, authorizes the Government to acquire flowage rights, and possibly fee simple, over these lands. Acquisition of so-called “comprehensive easements” over the land, at an estimated total cost of about \$1,200,000, is now in progress.

4. *West Atchafalaya*.—This floodway will be used, if required then, only when floods on the lower river exceed 2,500,000 second-feet (*supra*, p. 7). The Government did not construe the 1928 Act as

⁵⁰ General Schley, 1938 House Hearings, p. 876; 1938 Annual Report of Chief of Engineers, pp. 2086–2087.

⁵¹ General Ferguson, 1938 House Hearings, p. 61.

⁵² General Schley, 1938 House Hearings, p. 879.

⁵³ General Schley, 1938 House Hearings, p. 877.

directing acquisition of flowage rights in this floodway, since its flood protection had not been diminished. The 1936 Act seems to have been a ratification. (See our main Brief, pp. 73-76.) It was so interpreted by Mr. Whittington, Chairman of the House Committee on Flood Control.⁵⁴ However, Section 12 of that Act directed acquisition of flowage rights in the west Atchafalaya basin in the discretion of the Chief of Engineers (Br. —), and the 1938 Act (*infra*, pp. 24, 25) permitted the United States in the discretion of the Chief of Engineers to purchase flowage rights in the lower part of the basin over lands "not subject to frequent overflow." The total cost of flowage rights is estimated at \$1,140,000.⁵⁵ Acquisition of flowage rights is now in progress.

5. *Eudora*.—This floodway, as we have shown, may never be used. The 1936 Act, in Section 12 (Br. 92), suspended its construction until the Chief of Engineers had arranged for the purchase of 75 percent of the flowage rights and levee rights-of-way; the 1938 Act (*infra*, p. 24) permits the Chief of Engineers by purchase or condemnation to acquire flowage rights in his discretion and apparently assumes that this will be done. The War Department, therefore, plans to acquire these rights before construction is begun.⁵⁶ In 1938 they had

⁵⁴ 1938 Senate Hearings, p. 144.

⁵⁵ General Schley, 1938 House Hearings, p. 877.

⁵⁶ Letter of Secretary of War, 1938 House Hearings, p. 845; General Schley, *ibid.*, p. 869.

secured options on only 29 percent of the land and many of these offers were unreasonably high; further, acquisition of options has been suspended." The appraised value of fee title to the 865,000 acres is \$24,615,000.⁵⁷

Neither the Constitution nor the 1928 Act requires payment for flowage rights in the west Atchafalaya and Eudora floodways. The 1936 Act assumed that "flowage rights" would be purchased, but the Committee reports indicate that this meant any rights for which just compensation would otherwise have to be paid under the Constitution after the taking (See our main brief, p. 76). The 1938 Act gives the Chief of Engineers at least a discretionary authority to acquire the flowage rights before construction of the floodways. If the Eudora floodway is to be constructed, and if the Chief of Engineers decides the Eudora floodway may back up to respondent's land, flowage rights will doubtless be acquired, either by voluntary purchase or through proceedings instituted under Section 4 of the 1928 Act. Then, unless the benefits offset the estimated damage, respondent may expect to receive payment for her flowage rights.

But this, of course, does not aid respondent. She sues under the Tucker Act and the Constitution for an accomplished taking because she is located in the

⁵⁷ General Schley, 1938 Senate Hearings, p. 24; 1938 Annual Report of Chief of Engineers, p. 2087.

⁵⁸ General Schley, 1938 House Hearings, p. 856.

abandoned Boeuf floodway. Even if the claim were based on the Eudora floodway, the statutory authority for the Government officers eventually to acquire flowage rights in the Eudora floodway cannot impose a liability on the United States in a suit brought under the Tucker Act, long in advance of construction of the floodway, for an alleged taking of flowage rights over land which has in fact been given greatly increased flood protection.

III

RELEVANCE OF THE CUT-OFF WORK

In our main brief we mistook an argument of the respondent in the lower court and demonstrated that, even if the added flood protection from the levees on the south bank of the Arkansas River were not a part of the 1928 plan, the Government could still rely on this related work to show there had been no taking (p. 49). In fact, those levees were a part of the plan from the outset. Jadwin Report, pars. 16, 129. Respondent's objection is in truth directed to the cut-off work in the main channel (pp. 192-209, 403-405).

As explained above (pp. 8-9), the cut-off work was not recommended in the Jadwin Report. Experimental work, however, proved so successful that it is now a major factor in the flood control program. The work could be viewed as authorized in 1928 under the general authority to engage in "channel stabilization and river regulation." Jad-

win Report, par. 131. And any lack of authority has amply been cured by subsequent Congressional ratification.. Markham 1935 Report, pars. 10, 191 (d), 21 (f), 34, 35, 43 (9); Section I of Act of June 15, 1936 (Br. 88); Markham 1937 Report, par. 36; Section 1 of Act of June 28, 1938, *infra*, p. 23.

And, of course, even if the work were neither authorized nor ratified, respondent hardly could show that her land receives less flood protection, or that her flowage rights were taken, simply because the Government's benefits were conferred upon her land without adequate statutory authority.

CONCLUSION

For these additional reasons it is, therefore, respectfully submitted that the decision of the court below should be reversed.

✓ ROBERT H. JACKSON,
Solicitor General.

FRANCIS M. SHEA,
Assistant Attorney General.

✓ WARNER W. GARDNER,

PAUL A. SWEENEY,

Special Assistants to the Attorney General.

AARON B. HOLMAN,

Attorney.

OCTOBER, 1939.

APPENDIX

The Act of June 28, 1938, c. 795, 52 Stat. 1215, provides in part:

SEC. 4. That the following works of improvement for the benefit of navigation and the control of destructive floodwaters and other purposes are hereby adopted and authorized to be prosecuted under the direction of the Secretary of War and supervision of the Chief of Engineers in accordance with the plans in the respective reports hereinafter designated: * * *

LOWER MISSISSIPPI RIVER

That in accordance with the recommendations of the Chief of Engineers, as set forth in his report of April 6, 1937, and published as Flood Control Committee Document Numbered 1, Seventy-fifth Congress, first session, paragraph 38 (b), except subparagraph (1), the project for flood control of the Lower Mississippi River adopted by the Act of May 15, 1928, as amended by the Act of June 15, 1936, as amended, is hereby modified and, as modified, is hereby adopted, and there is hereby authorized to be appropriated in addition to the sums previously authorized \$40,000,000 to be applied for the purposes set forth in said document covering the said recommendations, with the exceptions mentioned, subject to the provisions hereinafter made.

That the Flood Control Act of June 15, 1936, as amended, is amended as follows:

"The United States may, within the discretion of the Chief of Engineers, irrespective of other provisions of law, proceed to acquire all easements needed and of the character considered advisable in the Morganza floodway and to construct said Morganza floodway. Said Morganza floodway may, within the discretion of the Chief of Engineers, be modified as to its design and inflow.

"The said Morganza floodway, may be initiated and constructed without delay; and the United States may, within the discretion of the Chief of Engineers, irrespective of other provisions of law, proceed to the acquisition of flowage rights and flowage easements in the Eudora floodway, and to its construction as authorized by existing law: *Provided*, That the intakes of such Eudora floodway shall include an automatic masonry weir with its sill at such an elevation that it will not be overtopped by stages other than those capable of producing a stage of fifty-one feet or over on the Vicksburg gage: *Provided further*, That a fuseplug levee loop may be constructed behind said sill to prevent flow into the floodway until the predicted flood exceeds the safe capacity of the main river leveed channel, with a free-board of at least three feet, but said fuseplug levee may be artificially breached when in the opinion of the Chief of Engineers such breaching is advisable to insure the safety of the main river controlling levee line: *Provided further*, That the authority to acquire lands, flowage rights, and easements for floodways shall be confined to the floodways proper and

to the northward extension of Eudora: *Provided further*, That within the discretion of the Chief of Engineers, the guide line levees of the Eudora floodway may be extended south toward Old River: *Provided further*, That the Chief of Engineers is hereby authorized to construct the said Eudora floodway at such location as he may determine, in the vicinity of Eudora. The United States may, within the discretion of the Chief of Engineers irrespective of other provisions of law, proceed to acquire flowage rights and flowage easements in the northward extension of the Eudora floodway, as authorized by existing law, provided that pending the completion of such northward extension all the Riverside fuseplug levee extending south from the vicinity of Yancopin to the vicinity of Vau Cluse, Arkansas, and so as to connect with the existing levee of 1928 grade and section, shall be reconstructed to the 1914 grade and 1928 section: *Provided further*, That if the back protection levee is constructed prior to the construction of Eudora floodway, it shall be connected with the main Mississippi River levee and subsequently connected with the Eudora floodway when constructed: *Provided further*, That the Chief of Engineers is authorized, in his discretion, to negotiate options, make agreements and offers with respect to lands, flowage rights, easements, and rights-of-way involved, as provided by law, at prices deemed reasonable by him.

“The United States, irrespective of other provisions of law, may, within the discretion of the Chief of Engineers, acquire flowage easements over all lands not subject to frequent overflow in the Atchafalaya Basin below the latitude of Krotz Springs.

"Said Morganza floodway shall not be operated until the Wax Lake outlet has been put into operative condition.

"The fuseplug levees at the head of the Atchafalaya Basin on the east side of the Atchafalaya River shall be reconstructed to the 1928 grade and section.

"The United States may, in the discretion of the Chief of Engineers, acquire all flowage rights, flowage easements, rights-of-way for levee foundations, and titles in fee simple as herein provided, either by voluntary acquisition or in accordance with the condemnation proceedings by the Secretary of War as provided for in section 4 of the Flood Control Act of May 15, 1928.

"In the event the United States acquires or owns title to any lands in fee simple under the provisions of the Act of May 15, 1928, as amended and supplemented, the United States may retain the ownership thereof, or any part thereof instead of turning over such lands to the ownership of States or local interests as provided in section 4 of said Act of May 15, 1928, and may lease such lands: *Provided*, That 25 per centum of all moneys received and deposited in the Treasury of the United States during any fiscal year on account of such leases shall be paid, at the end of such year, by the Secretary of the Treasury to the State in which such property is situated, to be expended as the State legislature may prescribe for the benefit of the public schools and public roads of the county or counties in which such property is situated: *Provided further*, That when such property is situated in more than one State or county the distributive share to each from the proceeds

of such property shall be proportional to its area therein: *Provided further*, That no part of the appropriations herein or heretofore authorized for said Morganza and Eudora floodways and extension shall be used for any other purpose."

Except as herein amended, the Act of May 15, 1928, as amended by the Act of June 15, 1936, as amended, shall remain in full force and effect.